No. 07-393

In the Supreme Court of the United States

TED A. BRODOWY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
JEANNE E. DAVIDSON
KIRK MANHARDT
JOAN M. STENTIFORD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners were not entitled to a two-step pay increase pursuant to 5 U.S.C. 5334(b) (2000 & Supp. V 2005) upon their transfer to positions within the Air Traffic Controller pay system.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Bell Atl. Corp. v. *Twombly*, 127 S. Ct. 1955 (2007) 6
Libretto v. *United States*, 230 Ct. Cl. 790 (1982) 7
National Air Traffic Controllers Ass'n v. *Secretary of Transp.*, 997 F. Supp. 874 (N.D. Ohio 1998) 2
Papasan v. *Allain*, 478 U.S. 265 (1986) 6
United States v. *Clark*, 454 U.S. 555 (1982) 4, 7, 8

Statutes and regulation:

Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347(a), 109 Stat. 460 (49 U.S.C. 40122(g)(1)) 2, 8
§ 347(b), 109 Stat. 460 (49 U.S.C. 40122(g)(2)) 2
5 U.S.C. 5102(a)(5) 7
5 U.S.C. 5331 7
5 U.S.C. 5334(b) (2000 & Supp. V 2005) 4, 5, 7, 8
49 U.S.C. 106(*l*)(1) 2
5 C.F.R. 531.214(a) 7

In the Supreme Court of the United States

No. 07-393

TED A. BRODOWY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 482 F.3d 1370. The opinion of the United States Court of Federal Claims (Pet. App. 13a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2007. A petition for rehearing was denied on June 22, 2007 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on September 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are ten current or former air traffic controllers for the Federal Aviation Administration

(FAA). Pet. App. 2a. In the 1990s, the FAA categorized air traffic control towers into five levels, according to the volume of air traffic they handled and the complexity of the overall operations at each tower. *Id.* at 3a. Level 1 facilities were the least complex and least busy; Level 5 facilities were the busiest and most complex. *Ibid.* Controllers' government pay grades were determined by facility level. Each of the petitioners worked in a Level 1 facility until late 1999. *Id.* at 3a, 5a.

In the early 1990s, the FAA decided to privatize operations at all of its Level 1 facilities. Pet. App. 4a. As part of the privatization plan, controllers working at Level 1 facilities were given the opportunity to transfer to higher-level facilities and thereby remain FAA employees. *Ibid.* Petitioners were scheduled to be transferred to higher-level facilities in August 1998. *Ibid.* In March 1998, however, their transfers were postponed when a district court vacated the FAA's privatization program for failure to perform a required cost/benefit analysis. *Ibid.*; see *National Air Traffic Controllers Ass'n* v. *Secretary of Transp.*, 997 F. Supp. 874, 884-885 (N.D. Ohio 1998). The privatization program did not resume until 1999, after the FAA performed the required cost/benefit analysis. See Pet. App. 4a-5a.

2. In 1995, Congress enacted legislation authorizing the FAA Administrator to implement a new personnel management system for FAA employees, providing for "greater flexibility in * * * compensation." Department of Transportation and Related Agencies Appropriations Act, 1996 (Appropriations Act), Pub. L. No. 104-50, § 347(a), 109 Stat. 460 (49 U.S.C. 40122(g)(1)); see also 49 U.S.C. 106(*l*)(1). The General Schedule (GS) pay system no longer applied to FAA employees. See Appropriations Act, Pub. L. No. 104-50,

§ 347(b), 1[illegible]Stat. 460 (49 U.S.C. 40122(g)(2)). Pursuant to that authority, the FAA issued an administrative order on April 1, 1996, instituting a new pay system that, for the time being, mirrored the GS pay system pending conversion of the air traffic controllers to a new pay system. Pet. App. 3a n.1, 9a-10a.

In 1998, the FAA and petitioners' union, the National Air Traffic Controllers Association (NATCA), negotiated a new pay system for NATCA members through a collective bargaining agreement. Pet. App. 4a. Implementation of the new Air Traffic Controller (ATC) pay system was governed by "Pay and Reclassification Rules" agreed to by NATCA and the FAA. Under the new system, each employee was assigned an ATC level and a pay band. *Ibid.* Rule 35 provided a formula, based on a controller's grade and step under the GS pay system, for conversion to the ATC pay system. *Id.* at 4a-5a; see *id.* at 41a-44a (text of Rule 35).

The new ATC pay system took effect in October 1998, and superseded the GS system for all controllers except those (including petitioners) still working at Level 1 facilities, which the FAA still intended to privatize. Pet. App. 5a. Pursuant to Rule 35, controllers working at Level 1 facilities continued to be paid "in accordance with their current pay policies with the exception that their base pay will be increased by 5% in the first year." *Id.* at 5a, 44a.

Petitioners ultimately transferred to higher-level facilities in late 1999. Pet. App. 5a. At that time, they were converted to the new ATC pay system using the formula in Rule 35, based upon the GS grade and step level at which they were then working. *Ibid.*

3. In August 2005, petitioners filed suit in the United States Court of Federal Claims, claiming that

their transfers entitled them to higher salaries. Pet. 3; Pet. App. 53a-54a. They alleged that upon transferring to their new, higher-level facilities, they were entitled to be given a two-step pay increase under the GS pay system before their conversion to the ATC pay system. Petitioners relied on 5 U.S.C. 5334(b) (2000 & Supp. V 2005), which states in pertinent part:

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Petitioners claimed that because they did not receive the two-step pay increase under Section 5334(b), they were assigned to a lower ATC level and pay band than similarly situated air traffic controllers who transferred to higher-level facilities before the conversion to the ATC pay system. Pet. App. 5a-6a.

4. The Court of Federal Claims dismissed the complaint. Pet. App. 13a-31a. The court held that petitioners had failed to identify an applicable money-mandating statute and therefore had not properly invoked the court's jurisdiction under the Tucker Act. *Id.* at 18a-19a. The court acknowledged that Section 5334(b) is a money-mandating statute, but held that it did not apply to petitioners at all. *Id.* at 24a-29a, 30a. Relying on *United States* v. *Clark*, 454 U.S. 555, 561 (1982), the court held that "[t]he plain language of section 5334(b), as well as the implementing regulations, compel the conclusion that the statute only covers promotions or transfers within the GS system." Pet. App. 27a. Petitioners transferred to higher-level facilities only after all such

facilities had already converted to the new system, so they did not transfer within the GS pay system. *Ibid.* The court also rejected petitioners' attempts to identify an alternative money-mandating statute. *Id.* at 19a-24a, 29a-30a.

5. The court of appeals unanimously affirmed. Pet. App. 1a-11a. The court explained that Section 5334(b) is intended to ensure that any promotion to a higher GS grade results in a pay increase; because, for instance, a GS-10, step 10, makes more than a GS-11, step 1, Section 5334(b) ensures that an employee promoted from GS-10 to GS-11 will receive a higher salary. Pet. App. 6a-7a. Under this Court's decision in *Clark*, the court of appeals held, Section 5334(b) performs that function only for transfers within the GS pay system. *Id.* at 7a.

The court of appeals rejected petitioners' contention that they had, in fact, transferred within the GS pay system. Pet. App. 7a-8a. Petitioners could not rely on the conclusory allegation in their complaint that they had undergone a "GS-to-GS" transfer; indeed, their own pleading showed that "by the time they transferred to higher level facilities, those facilities had already transitioned to the ATC system." *Ibid.*

Finally, the court of appeals noted that the complaint should have been dismissed for failure to state a claim, rather than for lack of subject matter jurisdiction. Section 5334(b) is a money-mandating statute, and although it does not apply to petitioners, their attempt to plead a claim under Section 5334(b) was sufficient to invoke the jurisdiction of the Court of Federal Claims. Pet. App. 9a-11a. The court of appeals observed, however, that "the distinction between the two forms of dismissal has no apparent practical effect in this case." *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court. Further review is unwarranted.

1. Petitioners contend (Pet. 13-19) that the court of appeals erred by rejecting their contention that their conversion occurred in two steps—first a transfer to the new facility while remaining on the GS pay system, then a conversion to the ATC pay system. See Pet. App. 7a. They argue that the complaint pleaded this two-step sequence as a factual matter, and that the court of appeals was required to credit it. That is incorrect.

As the court of appeals recognized, the complaint alleged only that petitioners were *entitled* to receive an increase under the GS pay system after transfer but before conversion. See Pet. App. 48a-50a. This assertion is a legal one, and the courts below were not required to credit it at the pleading stage. See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citing *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986)). Indeed, petitioners' own complaint showed that their new facilities had already converted to the ATC pay system before they arrived, see Pet. App. 39a-40a.

Thus, the court of appeals correctly concluded that when petitioners transferred to the higher-level facilities, they were transferring outside the GS pay system. In any event, petitioners' fact-bound assertions about the correct reading of their complaint and the nature of their conversion do not warrant further review.

2. Petitioners also argue (Pet. 19-20) that even if the court of appeals were correct that they transferred out of the GS pay system, Section 5334(b) should still apply to their transfers. But as the court of appeals correctly held, this Court and the Federal Circuit's predecessor

court (the Court of Claims) have long since established that Section 5334(b) applies "only to promotions or transfers of employees already within the GS system," and not to transfers into or out of the GS pay system (absent some special indication by Congress). *United States* v. *Clark*, 454 U.S. 555, 561 (1982); see *Libretto* v. *United States*, 230 Ct. Cl. 790, 790 (1982).

Petitioners contend that the court of appeals misapplied *Clark* and that the ATC pay system is sufficiently similar to the GS pay system that Section 5334(b) should apply to transfers between the two different systems. Pet. 19-21. That argument is unavailing. In *Clark*, this Court did not hold that a "relationship" between the GS pay system and another pay system could render Section 5334(b) applicable to transfers between the two. To the contrary, the Court held that the "plain meaning" of Section 5334(b) and its related definitional provisions, see 5 U.S.C. 5102(a)(5), 5331, shows that the statute applies only to transfers within the GS pay system. *Clark*, 454 U.S. at 561. The Court also pointed to the relevant federal agency's consistent interpretation of the statute as applying only within the GS pay system. *Id.* at 565-566.* To resolve "any lingering doubt," the Court noted the absence of any legislative history supporting the notion that Congress meant to provide a two-level boost when employees transfer between the GS pay system and the Wage System; this was "hardly surprising," the Court noted, because the GS pay system and the Wage System had "no necessary or obvious relationship." *Id.* at 563, 564. The Court never suggested that establish-

* See 5 C.F.R. 531.214(a) ("The promotion rule in 5 U.S.C. 5334(b) and the implementing rules in this section apply only to a GS employee who is promoted from one GS grade to a higher GS grade."); *Clark*, 454 U.S. at 566 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
KIRK MANHARDT
JOAN M. STENTIFORD
Attorneys

NOVEMBER 2007